

DA 95-4<sup>2</sup> RECEIVED

BEFORE THE

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FEDERAL COMMUNICATIONS COMMISSION

Federal Communications Commission  
Office of the Secretary

WASHINGTON, D.C. 20554

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In the Matter of:

Request of A.C. Nielsen Co.  
for Permissive Use of Line  
22 of the Active Portion of  
the Television Video Signal

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DA 89-1060

To: The Commission

REPLY OF  
A.C. NIELSEN COMPANY  
TO SOUTHWEST MISSOURI CABLE TV, INC.'S  
OPPOSITION TO  
REQUEST FOR PERMISSIVE AUTHORITY

A.C. Nielsen Company ("Nielsen"), through its attorneys, hereby replies to the "Opposition to Request for Permissive Authority" filed April 9, 1990, (the "Opposition") by Southwest Missouri Cable TV, Inc. ("Southwest").<sup>1/</sup> For the reasons stated below and in Nielsen's Request for Permissive Authority ("Request"), filed March 15, 1990, the Commission should reject the Opposition and grant Nielsen's Request.

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<sup>1/</sup> Because Southwest's Opposition was filed almost two weeks late (see text, *infra*) and this Reply is being filed within five business days of the filing of the Opposition, Nielsen requests the Commission to consider this Reply as it responds to Southwest's untimely Opposition.

1. Pursuant to Sections 1.4 and 1.45 of the Commission's Rules, 47 C.F.R. §§ 1.4, 1.45 (1989), oppositions to Nielsen's Request were due to be filed no later than March 28, 1990. Southwest's Opposition was filed on April 9, 1990, almost two weeks out of time, and should be summarily rejected on that basis alone.

2. Nielsen has repeatedly explained throughout this proceeding the need of the syndicated programming industry for expeditious resolution of this matter, so that it can obtain as soon as possible the more reliable ratings that will result from Nielsen's use of line 22. Even Airtrax, a potential competitor of Nielsen, has recognized that Nielsen intends to provide a commercially necessary and desirable service to the broadcast and programming industries through the use of line 22. Opposition to Request for Permissive Authority, filed by Airtrax on April 9, 1990, at 3. Because of the unanticipated and extraordinary delays incurred in the Commission's review of Nielsen's Request, the industry was unable to receive those more reliable ratings in either the Fall 1989 or January 1990 television ratings periods. To avoid the further unavailability of these ratings to the industry in the Fall 1990 season as well, and after consultations with the Commission's staff on the matter, Nielsen filed its Request sufficiently far in advance of the expiration of its Temporary Authority to allow the Commission to consider any timely filed opposition to Nielsen's Request prior to the expiration of that Authority.

3. In spite of Nielsen's repeated requests for expedition, Southwest delayed the filing of its Opposition until almost a month after the filing of Nielsen's Request, long after the time allowed by the Commission's Rules and only a few weeks before the expiration of Nielsen's Temporary Authority. Southwest does not even attempt to offer an explanation for its untimeliness, and Southwest's Opposition should therefore be rejected as untimely or treated as only an informal objection.

4. Even if the Commission accepts Southwest's Opposition notwithstanding its untimeliness, it should reject the pleading on its merits. Southwest does not claim that it is an authorized user of line 22 (it is not); that it has ready for deployment a system that utilizes line 22; that its line 22 technology is close to fruition; or even that such technology will be developed within a specified time period. Rather, Southwest asks the Commission to deny Nielsen's Request solely because it "has been in contact with Real-Time Designs concerning the design of a system which would use line 22 to identify programming entitled to protection under the Commission's syndicated exclusivity and network nonduplication Rules (Part 76)." Opposition at 2. Thus, it claims that a grant of Nielsen's Request would "serve to preclude or could well preclude other valid existing or potential uses of Line 22."

5. Southwest's speculative contentions must be rejected. Southwest would have the Commission deny Nielsen's Request, presumably for an indefinite period, while it or Real-Time decides whether to design a system to use line 22, develops and tests such a system, and seeks Commission authorization to deploy such a system. In other words, Southwest seeks to prevent Nielsen, an authorized user of line 22, from deploying a system which has been tested and retested, examined and re-examined by the Commission, and which can be used to provide more accurate ratings the syndicated programming industry, merely because Southwest has contemplated another possible, but untested, use of line 22. Such a tenuous interest cannot be allowed to interfere with what even Nielsen's competitors see as a commercially desirable and necessary service to the broadcast industry.

6. Moreover, the underlying premise of Southwest's Opposition -- that Nielsen's use of line 22 "could well preclude" other authorized uses of the line -- is unsupported and contradicted by the lengthy record in this proceeding. Presently, four entities other than Nielsen claim to be using line 22 to transmit encoded information, and to Nielsen's knowledge, no interference by any of these users has been reported by other authorized users even during Nielsen's use of line 22 during the Temporary Authorization period. This is because, as Nielsen has argued ad infinitum, only one user will be authorized by the owner of programming or commercial

material to place codes on line 22 of any particular program or commercial at a particular time. This assures that conflicting uses will not occur in the normal course of business. To protect Southwest from the harm it alleges -- other potentially preclusive uses of line 22 -- the Commission would have to revoke the authority granted to all authorized users of the line. Since no tangible harm has been demonstrated despite multiple authorizations, there is no reason to do so at this time or to fail to add Nielsen to the list of authorized users of line 22.

7. Southwest's suggestion that Nielsen's Request be held in abeyance pending the outcome of a rulemaking proceeding proposed by Airtrax also should be rejected. Airtrax's proposed rulemaking proceeding concerning the use of line 22 is completely unwarranted and obviously intended merely to delay further the issuance of Nielsen's requested Authority. The Commission has thoroughly considered all issues relevant to Nielsen's Request, such as the technical characteristics and purposes of transmitting Nielsen's AMOL codes, and has at least twice determined that Nielsen's Request meets all the criteria that have been imposed upon similar requests in the past. Thus, Airtrax's proposed rulemaking proceeding not only is unnecessary, but would involve a wasteful, duplicative commitment of public and private resources. See Nielsen's Reply to Airtrax Opposition to Nielsen's Request, filed concurrently hereto. As Nielsen repeatedly has shown, there

are no issues of conflicting uses of line 22 that are appropriate for resolution in a rulemaking or other Commission proceeding.

8. In any case, the Commission should not delay the issuance to Nielsen of its requested authority pending its consideration of Airtrax's Petition for Rulemaking. There simply is no logical basis to delay the grant to Nielsen of its requested authority merely because the Commission is undertaking an evaluation of the technical parameters of service being provided on line 22 given the Commission's ability to condition all grants of authority to use line 22 on the outcome of such a proceeding. There is no reason to treat Nielsen differently than it has treated other authorized users of line 22, or by imposing upon Nielsen conditions or restrictions -- such as those set forth in the Temporary Authorization -- that have not been imposed upon other authorized users. Even if the Commission decides to undertake a substantive inquiry into this area, it should issue to Nielsen the same, unrestricted authority it has issued to all other parties that have met the same criteria.

For the foregoing reasons, the Commission should reject Southwest's Opposition and grant Nielsen's Request.

Respectfully submitted,

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Dated: April 16, 1990

Certificate of Service

I, Kimberly A. Smith, a secretary in the law firm of Gardner, Carton & Douglas, hereby certify that copies of the foregoing Reply of A.C. Nielsen were served this 16th day of April, 1990, by hand or by first-class mail, postage prepaid, on the following:

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